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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 FEDERAL TRADE COMMISSION,
4 PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

5 v.

17 CV 0124 (LLS)

Telephone Conference

6 QUINCY BIOSCIENCE HOLDING
7 COMPANY, INC., ET AL.,

8 Defendants.

9 -----x

New York, N.Y.

December 14, 2020

2:03 p.m.

10
11 Before:

12 HON. LOUIS L. STANTON,

13 District Judge

14 APPEARANCES VIA TELECONFERENCE

15 FEDERAL TRADE COMMISSION

16 Attorneys for Plaintiff FTC

17 BY: ANNETTE SOBERATS

MICHELLE K. RUSK

18 NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL

Attorneys for Plaintiff State of New York

19 BY: KATHRYN A. MATUSCHAK

20 KELLEY DRYE & WARREN LLP

Attorneys for Defendants

21 BY: GEOFFREY W. CASTELLO, III

AND

22 COZEN O'CONNOR

Attorneys for Defendants

23 BY: MICHAEL B. deLEEuw

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(The Court and all parties appearing telephonically)

THE COURT: Good afternoon.

UNIDENTIFIED SPEAKERS: Good afternoon.

THE COURT: I hear two male voices and one female, and so I can figure out the first one is Ms. Soberats and/or Ms. Matuschak. I think you better state your name when you're speaking, which also will be clearer for the record.

I have just read Quincy's December 10 letter responding to the FTC. Maybe the FTC should go first. I must say, I thought his letter was quite clear, the FTC's letter, but why doesn't the FTC say whatever it wants to say orally and then we can have Quincy reply?

MS. SOBERATS: Yes, your Honor. This is Annette Soberats speaking on behalf of the Federal Trade Commission.

Your Honor, the defendants have communicated to the FTC that they would like to proceed with the rule 30(b)(6) deposition of our agency --

THE COURT: Look, Ms. Soberats --

MS. SOBERATS: Yes.

THE COURT: -- I've read the correspondence.

MS. SOBERATS: Yes.

THE COURT: Don't tell me background stuff that we all know.

MS. SOBERATS: Correct. Well, as I stated in our letter, we believe that the Court's order was very clear that

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1 it was barring the 30(b)(6) deposition of both agencies, and in
2 that order, the Court did not direct the FTC to produce a
3 witness on any topic.

4 It's our understanding that defendants would like
5 clarification of the order, but we believe the Court's order
6 was very clear and that the Court agreed with us that --

7 THE COURT: Ms. Soberats.

8 MS. SOBERATS: Yes?

9 THE COURT: Ms. Soberats, if you're just repeating
10 what you said in the letter, then I feel responsible to answer.
11 I do not think the order was perfectly clear, I'm sorry to say.
12 But the defendant is correct in its interpretation that I was
13 only dealing with the matters before me, which is my usual
14 practice, I think most courts' usual practice.

15 And so the topics which I did not rule on, the
16 remaining ones that I did not regard as being at issue, are
17 open for the deposition. That's the good news for Quincy.

18 The good news for the government and for the witness
19 is that in allowing those questions to go forward, I am laying
20 great stress on the word "topics." In other words, in the
21 identification of the topics and the discussion of it in the
22 letters, no precise questions were put and no factual matters
23 were discussed and, therefore, why I am letting the questioning
24 on those topics go forward is simply because it is possible
25 that there may be something interesting to this case that falls

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1 under those topics and that could be explored by questioning.

2 The range of topics is very, very broad, but that does
3 not mean that the range of the questioning will be very, very
4 broad. The issues in this case are quite finite. What would
5 be allowed in evidence respecting them is quite apparent to any
6 trial lawyer, and it's not going to include the vast amount of
7 material which might be, in an uncontrolled deposition, allowed
8 to be sought. That is not the procedure that's to be followed.

9 I am merely deferring to the questioning process the
10 responsibility of counsel to confine his questions or her
11 questions to those that have something to do with this case,
12 and a whole lot of discussion with other people and other cases
13 under other circumstances regarding other topics is not part of
14 that inquiry.

15 So that is really the framework of our discussion.

16 MS. SOBERATS: Yes, your Honor. This is Annette
17 Soberats from the Federal Trade Commission.

18 And I would just like to clarify that, based on the
19 order, there were certain topics that the Court did prohibit
20 for the FTC. So the Court is referring to those topics that
21 remain? That's my understanding.

22 THE COURT: Exactly. I should have started by saying
23 that I'm embarrassed that the first sentence of the second full
24 paragraph on page 4 said: "Accordingly, plaintiff's motion for
25 a protective order barring the rule 30(b)(6) depositions of the

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1 NYAG and the FTC is granted." I think, technically, that may
2 fairly be read to mean there won't be any depositions. That is
3 not the intention of that order.

4 The intention of the order is that the protective
5 order is granted with respect to those items that were being
6 discussed, and on the others, it simply made no ruling at all.
7 And now the time to go forward with the depositions has come.
8 I am forecasting to counsel, in fairness, what the rules
9 respecting that deposition will be, and I'm sorry to have
10 written something that sent you off on these wild hunts.

11 Now, while I have the floor, I'll deal with another
12 point that was raised and the ruling, of course, is that any
13 ruling that applies to one plaintiff, also applies to the
14 other. I think the government had some doubt about that but,
15 of course, they get the benefit and the non-benefit of whatever
16 the ruling on the same point made as to their partner in the
17 case applies to them.

18 Now, where does that leave us this afternoon?

19 MS. SOBERATS: Your Honor, this is Annette Soberats
20 for the FTC.

21 Thank you for your clarification of the order. We
22 understand the Court's ruling, and we will proceed with
23 conferring with counsel on a date for 30(b)(6) depositions for
24 the FTC on the topics that the Court did not rule upon.

25 THE COURT: Thank you. And I must say, from your

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1 letters, it looks as though the FTC has been pretty forthcoming
2 on this.

3 MS. SOBERATS: Yes, your Honor.

4 THE COURT: I say that simply following the
5 representations of counsel. I haven't seen any of the
6 underlying data, as you know.

7 MS. SOBERATS: Your Honor, this status conference was
8 originally calendared for the purpose of setting an expert
9 discovery schedule, and I wanted to let the Court know that the
10 parties have met and conferred and agreed on deadlines for
11 initial expert reports, rebuttal reports and expert
12 depositions.

13 THE COURT: Oh, yes, yes. Those have to be expanded
14 to allow the work to be done.

15 MS. SOBERATS: Yes.

16 THE COURT: Let me ask you -- who am I talking to?

17 MS. SOBERATS: This is Annette Soberats from the
18 Federal Trade Commission.

19 THE COURT: I'm curious, if we're shifting ground, I
20 have a question to put to the lawyers for Quincy, but I'll
21 withhold it. And from your voice, I suspect that I'm still
22 talking to the government lawyers. Is there anything further
23 that you wish to present?

24 MS. SOBERATS: Your Honor, on behalf of the FTC, I
25 just wanted to let the Court know what the parties have decided

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1 on the expert discovery schedule, but there is another --

2 THE COURT: Oh, you can do that in writing.

3 MS. SOBERATS: Yes, we will.

4 THE COURT: Whatever you work out, I'm going to
5 approve.

6 MS. SOBERATS: Okay.

7 THE COURT: You're the ones that have to do the work,
8 not I. And it's much better for me to let -- you're
9 experienced, responsible counsel. I'm not going to second
10 guess you.

11 MS. SOBERATS: Yes. And on behalf of plaintiffs,
12 there is another dispute concerning fact discovery that we
13 wanted to bring to the Court's attention. We have been trying
14 to obtain intelligible dissemination information for the TBN
15 radio advertisements that contain the challenged claim. This
16 is information that is critical to our ability to prepare for
17 trial and to provide defendants with a sample of the ads that
18 we are challenging, which the Court also ordered us to do.

19 THE COURT: What is the information you want?

20 MS. SOBERATS: We would like to know when specific TV
21 and radio ads ran and where.

22 THE COURT: Oh.

23 MS. SOBERATS: Yes, that's information that we need,
24 your Honor, to produce a fair representation of the ads that we
25 are challenging, as this Court ordered us to do on

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1 December 3rd.

2 THE COURT: Is that the only way you can get it?

3 MS. SOBERATS: We have tried to obtain that
4 information from the defendants, and they provided us with a
5 list that contains titles for ads that we cannot recognize, and
6 we've been trying to work with them. We went back and we
7 identified the ads that we believe they're referring to, and we
8 simply asked them to confirm, yes or no, that we were matching
9 up those ads to the proper Bates numbers in their production.

10 And the defendants informed us on Friday that they
11 will not provide us with that simple "yes" or "no"
12 confirmation, your Honor.

13 THE COURT: Why not?

14 MS. SOBERATS: They believe they are under no
15 obligation to do that.

16 THE COURT: Let them speak for themselves.

17 MS. SOBERATS: Yes.

18 MR. CASTELLO: Your Honor, this is Castello for the
19 corporate defendants.

20 I don't think the story is as simple as it's being
21 conveyed to your Honor this afternoon. We have gone back and
22 forth on this issue for months and months. It is our position
23 that we've provided all of the information regarding the
24 dissemination of advertisements and marketing pieces that we've
25 produced.

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1 And we apparently have a disagreement, but I would
2 say, your Honor, I absolutely do not agree that we haven't
3 produced the data or have refused to give it. And I would
4 suggest that there might be a better way of going about this
5 because if your Honor will recall, the defendants took issue
6 with the fact that the FTC and the NYAG would not identify the
7 specific advertisements that they were challenging in this
8 action. And your Honor has required, through the order, both
9 of those agencies to provide us, the defendants, with a sample
10 of those ads.

11 And so we're now being asked to do exactly what the
12 FTC said it wouldn't do, and I suggest that maybe a better way
13 to go about it is for the FTC and NYAG to put together their
14 sample of representative ads and give them to us, to the
15 defendants. And we will go and try to determine what
16 dissemination information exists for them that we have not
17 already provided.

18 THE COURT: It seems to me much more practical that if
19 they want to identify what a specific ad is that they ask you,
20 that you should say "yes" or "no." That allows them a freer
21 and more accurate hand in preparing their sample.

22 While we're talking, what information of value to
23 Quincy -- not in the abstract, but for use at trial -- are you
24 seeking with respect to all of these wide collateral topics of
25 what they did in other cases, what individual employees may

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1 have seen or said or written or perceived? What are the jury
2 points that you are seeking?

3 MR. CASTELLO: With respect to the other cases, your
4 Honor, that we've sought information on, specifically with
5 respect to other manufacturers and advertisers of brain health
6 supplements, we would like to know what it was that the FTC did
7 with those other investigations and actions to determine
8 whether or not the treatment here is disparate compared to
9 those other cases because I believe --

10 THE COURT: Why is that relevant or interesting?

11 MR. CASTELLO: Well, your Honor, I think it's relevant
12 because it helps us determine why we are the target of this
13 lawsuit when other manufacturers and advertisers of brain
14 health supplements might not be.

15 Your Honor, the other reason for the depositions, and
16 if your Honor has narrowed it earlier, I understand what your
17 Honor has said, and we will abide by your Honor's direction.

18 But there is no difference between these agencies and
19 any other civil litigant in federal district court. And part
20 of the issue with depositions is you learn at the deposition
21 things that you did not know before, and if you are foreclosed
22 from taking that deposition, you'll never have the opportunity
23 to even pursue questions and topics for investigation that
24 might be relevant.

25 And so, I am not looking to take a deposition of

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1 either one of these agencies just for the purpose of taking a
2 deposition. I'd like to learn what I don't already know from a
3 litigant, a civil litigant in an action in the same manner in
4 which both of those agencies took the deposition of the
5 defendants.

6 THE COURT: But there is no general underlying rule
7 that the agency must do in one case, on the facts as perceived
8 in that case, in the same way in this case with the facts as
9 perceived by them in this case. There's simply no parallel,
10 and I'm trying to speculate on something along that line that I
11 would allow you to argue to a jury, and I simply haven't found
12 it yet and I'm not hearing it.

13 MR. CASTELLO: Well, your Honor, I don't know what
14 information either one of these agencies may have in their
15 possession that I would consider to be --

16 THE COURT: I'm allowing you to seek it for that
17 reason. I don't know either. But in taking that deposition, I
18 want you to be aware you're on very thin ice because I think
19 the whole search is off the point of the issues that we're
20 going to be trying in this case, which is FTC against Quincy,
21 not FTC against anybody else.

22 MR. CASTELLO: I appreciate that, your Honor, but if I
23 may just to continue. For instance, if FTC has considered
24 evidence from another manufacturer that one of -- and for that
25 reason did not pursue either an action or came to some other

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1 determination through the use of that material that was
2 produced by that defendant, and I thought that that was
3 something that I wanted to share with my expert to determine
4 whether we're talking about apples to oranges or apples to
5 apples, that's the type of information I'd be interested in.

6 I'd also be interested in learning what type of
7 exculpatory information or evidence these agencies may possess
8 because I believe that's directly relevant to their claims in
9 this action. We have a fundamental disagreement about science
10 here, and I would like to be able to visit with our experts
11 what we learn at these depositions.

12 There might not be anything of value there, your
13 Honor, and we certainly wouldn't argue to a jury extraneous or
14 irrelevant material. I just don't know right now what I don't
15 know.

16 THE COURT: Of what interest is it in this case that
17 there's an inconsistency between the way the FTC is approaching
18 this one and the way it approached some other one?

19 MR. CASTELLO: If in another case, your Honor, the
20 defendant came forward with scientific substantiation for its
21 claims that my expert believed is exactly the type of
22 scientific substantiation that Quincy has provided, I'd like to
23 be able to argue to a jury that the arbitrary decision by an
24 agency to pursue one defendant or one manufacturer over another
25 when they have the same level of substantiation is relevant, it

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1 means something. And it should mean something to a juror what
2 those apples and apples are and how that fits in in the context
3 of this action.

4 MS. SOBERATS: Your Honor, this is Annette Soberats
5 from the FTC --

6 THE COURT: Excuse me. Hold on a moment.

7 I would think that if the evidence, the scientific
8 view on the facts was on facts that were very much the same as
9 the issues in this case, that that might give you a ground to
10 argue that they were right in that case and are wrong in this
11 case. And that might make an argument that you could make to
12 the jury, and it's for considerations like that that I'm
13 allowing you to go forward delicately, narrowly and factually
14 along that line, to see if anything like that turns up.

15 I think that's within your legitimate trial
16 preparation. But I have no faith in the argument that the mere
17 inconsistency shows some bias or antipathy outside of the facts
18 on the part of the government agency. But I'm letting you go
19 forward to develop, if you can, just that kind of argument.

20 MR. CASTELLO: Thank you. Thank you, your Honor.

21 THE COURT: I would expect that the source for it
22 would have been found in the scientific community, rather than
23 in the legal community, but I am hopelessly naive in these
24 matters.

25 Ms. Soberats, I think I cut you off.

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1 MS. SOBERATS: Yes. Your Honor, thank you for
2 allowing me to respond. I just wanted to clarify that the FTC
3 has responded in writing to defendants' interrogatory asking us
4 to identify, for the past ten years, other actions that we have
5 brought against dietary supplement companies that have marketed
6 products for memory or improved cognition. And one of the
7 outstanding requests that they have is to question us on
8 identifying every FTC employee who has ever communicated --

9 THE COURT: I'm not going to entertain that kind of
10 question. It falls by its own weight. There's not a judge
11 sitting in this court who wouldn't say that isn't too broad
12 and, of course, it's vacated as too broad.

13 MS. SOBERATS: Thank you, your Honor. I also would
14 like to clarify, there have been multiple references to a jury
15 trial. It is plaintiff's view that this is a case in equity
16 and that, on that basis, it should proceed as a bench trial,
17 your Honor.

18 THE COURT: I'm not sure I understood what you were
19 saying. I'm actually sure I didn't understand what you were
20 saying.

21 MS. SOBERATS: Oh, I'm sorry. I'll try to be clearer.
22 There have been several references during this status
23 conference to a jury, and it is plaintiff's view that the trial
24 should be a bench trial.

25 THE COURT: Oh, but are you seeking only injunctive

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1 relief?

2 MS. SOBERATS: We are seeking injunctive relief and
3 ancillary equitable monetary relief.

4 THE COURT: What's the equitable extra relief?

5 MS. SOBERATS: We are seeking redress in the form of
6 consumer refunds, and if that is not feasible, your Honor, we
7 would be seeking disgorgement.

8 THE COURT: Well, you see, there you're edging, I
9 think, out of equity. I understand, I do, that it's a
10 descendent of equity, but when you get down to dollars and
11 cents and the payment from one to another, you're pretty close
12 to a law situation. That's why I've been considering it as a
13 jury trial throughout. I do recognize, of course, that the
14 main relief is the injunction, but the damages in these cases
15 is a non-trivial.

16 MS. SOBERATS: And, your Honor, courts have routinely
17 rejected jury demands in FTC cases, and we believe that the law
18 in the Second Circuit is clear that the type of relief we're
19 seeking is equitable in nature.

20 And we also believe that the defendants have waived
21 their right to a jury trial. They filed their answer over a
22 year ago, and they did not raise a jury trial in their answer
23 or 14 days later, as would have been required under rule 38.

24 But regardless, your Honor, we think that the law is
25 very clear in the Second Circuit that the type of relief that

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1 plaintiffs are seeking is equitable in nature and, therefore,
2 this case should proceed as a bench trial.

3 THE COURT: What do you think about that,
4 Mr. Castello?

5 MR. CASTELLO: Yes, your Honor. Castello for the
6 corporate defendants.

7 A couple of issues there, your Honor. We have, and I
8 believe your Honor in the order that was issued on -- I'm
9 sorry, I'm just going to grab the date here; it's document
10 148 -- on December 3rd did reference a jury trial.

11 In our case management order and at the conference,
12 your Honor, we did raise the issue of a jury trial. And I
13 would also note that NYAG is seeking relief under the GBL and
14 has demanded a relief in the form of civil penalties, and that
15 is not an equitable matter, your Honor.

16 And I would disagree with Ms. Soberats' and the FTC's
17 position that disgorgement or restitution are strictly
18 equitable. I believe that, as your Honor mentioned, it teeters
19 on the edge of law and equity. And with the amount of money at
20 issue here, I believe that it is a proper issue to put before a
21 juror.

22 MS. MATUSCHAK: Your Honor, this is Kate Matuschak for
23 the Attorney General, if I could be permitted to respond?

24 THE COURT: Sure.

25 MS. MATUSCHAK: Thank you, your Honor. We agree with

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1 the FTC's position that it's quite clear that there's been a
2 waiver of the jury trial demand here.

3 In addition, yes, we are also seeking restitution and
4 disgorgement, both of which sound in equity, and this case is
5 also seeking injunctive relief; so this case is really
6 equitable in nature.

7 It is true that we are also seeking penalties under
8 GBL section 350(d), but that portion of the relief we were
9 seeking is ancillary to this action, which really does sound in
10 equity.

11 So if the Court is inclined to disagree on that, we
12 would respectfully request the opportunity to brief the Court
13 so that we could show the Court the case law that we have that
14 supports our position that this case is not one in which the
15 defendants are entitled to a jury trial.

16 THE COURT: I think it's an interesting question, and
17 I'm certainly not going to rule this afternoon from the hip. I
18 do think you should brief it, and we should all have a chance
19 to think about it. Frankly, I've simply formed the impression
20 that I described to you earlier, that it was a jury case, but
21 if it's really an issue, it's an issue that's important and
22 should be briefed briefly and thoughtfully and to the point and
23 decided promptly. You're free to do that.

24 The defendant says they already made a jury demand at
25 a conference, and I think you have to take that seriously in

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1 your waiver argument. But I don't remember the date of the
2 conference or the relationship to the pleading under rule
3 30(a), but it's an important point and I would want to think
4 about it.

5 It makes a big difference to the trial and may make a
6 difference to the outcome because the jury doesn't have to
7 explain their reasoning. My mind has been a great deal opened
8 on it by what the FTC has said, but as you know, and is in
9 almost every court a kind of a bias towards a jury and if
10 there's any really serious reasons supporting it. And on that,
11 I'm drawing a blank because this is the first time I've heard
12 it.

13 MS. MATUSCHAK: This is Kate Matuschak from the
14 New York Attorney General again. Thank you, your Honor. I
15 really appreciate your willingness to consider the issue, and
16 we would be happy to brief it for the Court.

17 THE COURT: Is there anything else we should deal with
18 now?

19 MS. MATUSCHAK: Your Honor, this is Kate Matuschak
20 again from the New York Attorney General's Office.

21 I just wanted to flag for the Court that we may or may
22 not be coming to the Court with respect to an issue of fact
23 discovery because defendants have not given us a definitive
24 answer on whether they will give us discovery essential for us
25 to determine our financial relief that we would request.

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1 Defendants have taken the position that discovery
2 necessary for our financial relief is not relevant until
3 liability is determined. They have committed to giving us
4 their financial statements after liability is determined in
5 this case because their sales and advertising are continuing,
6 and so the restitution and disgorgement and penalty amounts are
7 accumulating.

8 But in addition to some financial statements, we've
9 also requested an updated response to the written discovery
10 requests related to penalties and to disgorgement, and we have
11 not yet received a response as to whether defendants will do
12 that. So we may be coming to the Court for relief on that in
13 coming weeks.

14 MR. CASTELLO: Your Honor, if I may? This is
15 Castello. I think that was a pitch, perhaps, for a jury trial,
16 but I'll leave that for your Honor's eye for another day. But
17 what I did want to say, once again, we have a disagreement over
18 the amount of discovery, I suppose, or the up-to-date nature of
19 the discovery.

20 We have already provided voluminous financial data
21 regarding sales sold, and I would note that it was the NYAG
22 that also proposed holding in abeyance further production of
23 financial information pending a determination on liability,
24 which I think makes good sense.

25 THE COURT: Are you talking about bifurcating this

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1 case?

2 MS. MATUSCHAK: No, your Honor. I think the NYAG --

3 THE COURT: No, I'm asking Mr. Castello. He wants to
4 withhold financial information pending a determination of
5 liability, I thought he said.

6 MR. CASTELLO: And that was a proposal that the NYAG
7 had entertained, and all I said, your Honor, was I believe
8 that, at this point, they have all of the financial information
9 up to a date certain. We have not withheld it.

10 What we are withholding is the continuous
11 back-and-forth production of financial information as that data
12 continues to develop month after month.

13 So it's just going to be numbers that will change,
14 your Honor. The substance won't. Just the numbers will, and
15 that information is not relevant at this stage. There's
16 nothing in the case or at trial that would require that
17 information now.

18 THE COURT: Well, the bringing of the case does not
19 entitle the FTC to a continuing audit of the defendants'
20 earnings or conduct of its business. So maybe a suspense in
21 that and then an updating of it, to the extent needed, just
22 before trial might serve everybody's purposes.

23 I must say that, on the whole, and putting aside the
24 flotilla of arguments presented on every point by both sides,
25 that on the whole, the production in this case has been very

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1 reasonable. And after a lot of huffing and puffing, there is a
2 grownup disclosure of the things the other side needs and
3 should have.

4 And I really urge you to continue in that way. It's
5 the way trial lawyers should act. The case has to be, in the
6 end, tried on the whole. The relevant things have to emerge
7 and be heard. The lawyers are supposed to facilitate that and
8 not encumber it with a whole lot of petty arguments or hopeful
9 detours. And I think, on the whole, you've come around in each
10 case to a rather reasonable outcome. So I urge you to continue
11 that, and I'll try to write clearer orders.

12 MR. CASTELLO: Thank you, your Honor.

13 MS. SOBERATS: Thank you, your Honor.

14 MS. MATUSCHAK: Thank you, your Honor.

15 THE COURT: Thanks very much. Bye now.

16 (Adjourned)